

NOT DESIGNATED FOR PUBLICATION
ARKANSAS SUPREME COURT
No. CR 06-993

METTRO TARDAK JOHNSON
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 12, 2007

APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY, CR 2003-3526,
HON. JOHN W. LANGSTON, JUDGE

AFFIRMED.

PER CURIAM

Metro Tardak Johnson, appellant herein, was convicted by a jury of first-degree murder and sentenced to 300 months' imprisonment. The Arkansas Court of Appeals affirmed. *Johnson v. State*, CACR 04-612 (Ark. App. Feb. 2, 2005). Subsequently, appellant filed in the trial court a timely petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petition after a hearing, and appellant lodged an appeal here from the order.

On appeal, appellant maintains that trial counsel rendered ineffective assistance. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

Evidence adduced at trial showed that not long after an extended hand-to-hand fight between

them, appellant shot the victim with a twelve-gauge sawed-off shotgun in front of appellant's house. The shot caused the victim to fall to the ground, incapacitated. Appellant then walked over to the victim's prone body, which was riddled with at least 100 bird-shot pellets, and hit the victim on his head and ear with the butt of the shotgun. The force of the blows caused the gun to come apart in pieces.

At trial, appellant maintained that he shot the victim in self-defense. He claimed that the victim, with a knife in his hand, was approaching him in a menacing manner. Appellant was the only witness to testify that the victim held a knife, and no knife was found at the crime scene. In contrast, a number of witnesses to the murder testified that the victim was walking away from appellant's house when the shooting occurred, and that the victim was not the aggressor prior to the shooting. Appellant gave the victim no warning before firing.

On appeal, appellant claims that trial counsel rendered ineffective assistance for: (1) failure to offer the optional bracketed portion of a jury instruction; (2) failure to interview a neighbor of appellant's and call her as a witness during the trial; (3) failure to call witnesses to corroborate appellant's defense of justification; (4) failure to properly move for directed verdict at trial. The trial court's order found that appellant's petition did not state grounds for relief pursuant to Ark. R. Crim. P. 37.1, and that trial counsel's representation was not ineffective or that appellant was not prejudiced by actions on the part of counsel.

In his first point on appeal, appellant contends that trial counsel should have offered an optional bracketed portion of AMI Crim. 2d 705, regarding the defense of justification and the use of deadly physical force for inclusion in the jury instructions. The specific instruction given to the jurors stated, in part:

Mettro Johnson asserts as a defense to the charges of Murder in the First Degree and Murder in the Second Degree that deadly physical force was necessary to defend himself.

This is a defense only if:

First, Metro Johnson reasonably believed that [the victim] was committing or was about to commit battery with force or violence, or was using or about to use unlawful deadly physical force;

And Second: Metro Johnson only used such force as he reasonably believed to be necessary.

A person is not justified in using deadly physical force if he knows that the use of deadly physical force can be avoided with complete safety by retreating.

The additional bracketed wording would have been inserted after the last sentence quoted above. This language states, “However, he is not required to retreat if he is in his dwelling and was not the original aggressor.” Appellant argues that trial counsel was ineffective for failing to request this additional language. At trial, he testified that he was standing “in [his] doorway on [his] porch” when he shot the victim, although he was the only witness to make this claim.¹ He contends here that his dwelling included his front porch, thus making the additional language properly included in the instruction.

At the hearing on his Rule 37.1 petition, trial counsel testified that he researched the issue and came to the conclusion that appellant’s porch did not fit within the definition of “dwelling” for the purpose of including the additional sentence in the instruction. In contrast, appellant maintains that his porch was part of his dwelling as it was “partly enclosed by several floor[-]to[-]ceiling pillars and railing with both horizontal and vertical components to it.” He also describes that the porch “projects from the house, is roofed, [and] is at the same floor level as the house[.]”

¹However, during appellant’s cross-examination by the State, he stated that he came out on the porch before shooting the victim. Other witnesses at trial described how appellant shot the victim either while on the porch, or after he left the porch and was walking toward the victim across the front lawn. The court of appeals noted the conflicting testimony and various versions of events in its opinion. *Johnson, supra*. Also, the trial court’s order denying appellant’s Rule 37.1 petition recounts the testimony of various witnesses on this point.

To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness, and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (per curiam). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent the errors. *Greene, supra*. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.*

The defense of justification, including the use of deadly physical force, is statutorily based in Arkansas. Ark. Code Ann. § 5-2-607(a) (Repl. 2006). This chapter defines a "dwelling" as "an enclosed space that is used or intended to be used as a human habitation, home, or residence on a temporary or permanent basis[.]" Ark. Code Ann. § 5-2-601(3) (Repl. 2006). Arkansas case law supports the conclusion that unenclosed porches are not considered to be part of a dwelling for the defense of justification. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003), citing *Hopes v. State*, 294 Ark. 319, 742 S.W.2d 561 (1988).²

The trial court's findings of fact and conclusions of law determined that the photographs of appellant's porch "clearly demonstrate[d] that the porch was not enclosed, and did not meet the

²We have likewise held that curtilage is not included in the definition of "dwelling" for application of section 5-2-607 and criminal jury instruction 705. *Anderson, supra*. We are cognizant that Act 111 of 2007 will allow retreat to a dwelling or curtilage surrounding the dwelling when claiming justification as a defense, and will add a definition of curtilage that will include areas that are "not necessarily enclosed[.]" However, that statutory amendment does not affect the decision in the instant matter, as it is not to be applied retroactively.

definition of a dwelling. Had defense counsel requested the language in question on that basis, it would not have been given by the Court.” Trial counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene, supra*; *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). We cannot say that the trial court erred in finding that trial counsel’s representation was adequate in this regard.

Next, appellant argues that trial counsel was ineffective for failure to interview a neighbor of appellant’s and call her as a witness during the trial. Appellant maintains that Edna Jean Turner would have been able to testify that Nick McDaniel, another witness, was not at the scene of the shooting, thereby discrediting his trial testimony.³

Trial counsel testified at the Rule 37.1 hearing that he requested that appellant and his girlfriend, Elania Harper, who was also the sister of the victim, make contact with Ms. Turner in order to ascertain whether she had any information that would assist in appellant’s defense. Appellant and Ms. Harper did not contact Ms. Turner, and did not report any further information to trial counsel about her. As a result, trial counsel did not contact Ms. Turner.

Ms. Turner, who lived across the street from appellant’s house, testified at the Rule 37.1 hearing. She stated that she was inside her house at the time of the shooting, and did not witness the shooting. When she heard a loud noise and a number of screams, she ran outside to see what had happened. Ms. Turner was one of the first people on the scene after the shooting occurred, but

³Mr. McDaniel testified that the victim was walking away from appellant’s house when appellant called him names. When the victim turned around, appellant ran into the house, grabbed the shotgun, jumped off the porch and was running across the lawn when he shot the victim. According to Mr. McDaniel, the victim did not make any threats against appellant, move toward appellant, or have a knife in his hand. Mr. McDaniel recalled seeing a woman at the scene of the shooting who was not a family member of the victim’s, but he did not identify this woman.

admitted that she was shaken up by seeing the victim lying in the street. She could not say who actually witnessed the shooting, although she stated that she did not see Mr. McDaniel when she arrived at appellant's house, and would have testified to that at trial if asked. However, she did not know who Mr. McDaniel was until after the incident occurred. Several other witnesses testified that they saw Mr. McDaniel at the crime scene, which directly conflicted with the testimony of Ms. Turner, appellant, and Ms. Harper that Mr. McDaniel did not witness the shooting.

Matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for a finding of ineffective assistance of counsel. *Noel, supra*. The objective in reviewing an assertion of ineffective assistance of counsel concerning the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice which denied the petitioner a fair trial. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987) (per curiam). An attorney's decision not to call a particular witness is largely a matter of professional judgment⁴, and even the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not, in itself, proof of counsel's ineffectiveness. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001).

Here, both appellant and Ms. Harper testified unequivocally that Mr. McDaniel was not

⁴With regard to professional judgment, the United States Supreme Court in *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003), quoting *Strickland*, 466 U.S. at 690-91, stated: [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

present at the time of the shooting, making Ms. Turner's testimony merely cumulative to their testimony. Ms. Turner admitted that she was not present when the shots were fired, so she had no personal knowledge as to who actually witnessed the shooting. Her acknowledgment that seeing the victim lying in the street "sort of threw [her] in a whiz" would have subjected her to cross-examination regarding her ability to clearly recall facts from that day, considering her state of mind. Further, her admission that she did not know who Mr. McDaniel was prior to this incident cast doubt on whether she would have been able to positively identify Mr. McDaniel as being absent from the crime scene.

Appellant argues that "there is a reasonable probability that the result would have been different" if Ms. Turner had testified. In spite of appellant's conclusory statement, the substance of her testimony and her state of mind at the time of the incident would not shed sufficient doubt on Mr. McDaniel's testimony to cause prejudice to appellant in the absence of such testimony. Besides Mr. McDaniel, several other witnesses placed him at the scene at the time of the shooting. Thus, there is a reasonable probability that the inclusion of her testimony would not have resulted in a different decision by the jury. Appellant failed to prove either that counsel's actions were ineffective, or that he suffered prejudice as a result of such actions.

Appellant's third point on appeal is that trial counsel was ineffective for failing to call witnesses to corroborate appellant's defense of justification, based upon the victim's reputation for violence. Several months prior to the shooting, the victim was involved in an altercation with Cary Cook. The victim broke Mr. Cook's neck, leaving Mr. Cook paralyzed and in a wheel chair.

Mr. Cook and Delene Stubbs, his sister, testified at the Rule 37.1 hearing that they both knew of the victim's reputation for violence and being a bully. Both of them also stated that they were

willing and able to testify at appellant's trial about the victim's reputation. Trial counsel spoke with Mr. Cook and Ms. Stubbs regarding the incident between the victim and Mr. Cook, but called neither as a witness at the jury trial.

Through appellant's and Ms. Harper's testimony, trial counsel was able to elicit the victim's reputation in the community for violence. Mr. Cook's or Ms. Stubbs's testimony on this topic would have resulted in cumulative testimony on this point. More importantly, trial counsel testified at the Rule 37.1 hearing that he did not call either Mr. Cook or Ms. Stubbs as witnesses as he had information that the victim may have acted in self-defense when he injured Mr. Cook. As a result, counsel was concerned that the trial could become inappropriately focused on whether the victim acted in self-defense against Mr. Cook, and, by extension, against appellant. Counsel reasoned that in some instances, a minor contested issue becomes a focal point of the trial, rather than the real issue at hand. The argument counsel sought to keep at the forefront of the trial was that appellant "had reason to be afraid of [the victim] based on what he heard, regardless of whether what he heard was actually accurate." This contention formed the paramount basis of appellant's claim of self-defense.

Trial counsel concisely set out in the Rule 37.1 hearing the strategy he employed at appellant's trial regarding the testimony of Mr. Cook and Ms. Stubbs. Without question, such trial strategy and tactics are within the parameters of professional judgment. As such, appellant's contention fails to state grounds for a finding of ineffective assistance of counsel. *Noel, supra*.

Finally, appellant claims that trial counsel failed to properly move for directed verdict. At trial, counsel sought a directed verdict at the appropriate times, but argued that the State failed to prove "premeditation" on the part of appellant. First-degree murder requires proof that the defendant

had the purpose to cause the death of another person, and did cause the death of another person. Ark. Code Ann. § 5-10-102(a)(2) (Repl. 2006). In his direct appeal, the court of appeals refused to consider appellant's claim that there was insufficient evidence to support the jury's verdict based on trial counsel's directed verdict language, i.e., failure to argue "that the State failed to show that he acted with the purpose to cause Harper's death and moreover, h[is] fail[ure] to challenge any other elements of the offense." *Johnson, supra*.

Here, the trial court found that there was more than sufficient evidence for the State to have proved all the elements of first-degree murder without having to resort to speculation or conjecture. As such, the court would have denied a properly worded motion for directed verdict as well, thus resulting in no prejudice to appellant. On appeal, appellant argues that the "trial court's conclusion misses the point, however. The issue is whether it would entail speculation and conjecture to make a prima facie case of a purposeful non-justifiable shooting. [W]hen one takes all the testimony in its entirety, such a finding would have been speculative."

Because of the standard for proving ineffective assistance of counsel, the burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). Allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Id.* at 413, 39 S.W.3d at 795. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). In the instant matter, appellant failed to meet his burden of proving this allegation of ineffective assistance of counsel, in that he states mere conclusions rather than facts to substantiate his claim on this point. Thus, we cannot evaluate appellant's claims of ineffective assistance according to the "cause and prejudice" test in *Strickland*.

Moreover, as appellant contends that the trial court “missed the point” of his argument below, the ruling did not address his specific contention. Failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes review on appeal, and we must therefore decline to address such an issue. *Fisher v. State*, 364 Ark. 216, ___ S.W.3d ___ (2005); *Huddleston v. State*, 347 Ark. 226, 61 S.W.3d 163 (2001) (per curiam).

We find no error and affirm the decision of the trial court.

Affirmed.